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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections 11
and 13 of the Cable Television
Consumer Protection and
Competition Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-Trafficking Provisions

MM Docket No. 92-264

**PETITION FOR CLARIFICATION OR, ALTERNATIVELY, FOR
RECONSIDERATION OF THE NATIONAL PRIVATE CABLE ASSOCIATION,
MSE CABLE SYSTEMS, CABLE PLUS AND METROPOLITAN SATELLITE**

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INTRODUCTION AND SUMMARY

The National Private Cable Association ("NPCA"), MSE Cable Systems, Cable Plus and Metropolitan Satellite, by their attorneys, hereby submit their Petition For Clarification Or, Alternatively, For Reconsideration of the Report And Order ("Report") released July 23, 1993 in the above-captioned proceeding.^{1/}

NPCA seeks clarification that the cross-ownership rules do not prohibit a satellite master antenna television ("SMATV")^{2/} operator from selling or assigning to a franchised

^{1/} Petitioner NPCA is a national trade association representing the interests of SMATV operators before federal and state legislatures and agencies. The remaining Petitioners own and operate multiple SMATV systems in numerous states throughout the country. Petitioners are collectively referred to hereafter as NPCA.

^{2/} SMATV operators generally are understood to provide service to apartment complexes, condominiums, hotels, and other residential multiunit dwellings, access to which depends upon the permission of the landlord or other property owner.

cable operator the SMATV operator's contractual right of access to a multiunit dwelling. There is no statutory basis for such a restriction, as is demonstrated by the Commission's rules permitting all other multichannel video program distributors ("MVPDs") to sell their access rights to the local franchised cable operator. Congress simply intended to prohibit the cable industry from taking advantage of regulatory benefits, such as the SMATV exemption from franchise requirements, intended to be enjoyed by those who are apart from, and who offer true competition to, the franchised industry. By this Petition, NPCA seeks to insure that the Commission does not single out the SMATV industry for the imposition of arbitrary burdens that have not been imposed on any other MVPDs, that have no statutory basis, and that will injure competition by eliminating SMATV operators from the marketplace or freezing their growth.

A. Congress Intended To Grant SMATV Operators The Same Cross-Ownership Protections As The Commission Has Ordained For MMDS.

Since at least 1984 Congress has sought to boost the role of SMATV and multichannel multipoint distribution service ("MMDS") operators as competitors to the franchised cable industry. See, e.g., H. Rep. No. 934, 98th Cong., 2d Sess. 22-23 (1984). In furtherance of this policy, the Commission grants MMDS operators exclusive licenses for use of specific frequencies within a protected service area and exempts licensees from local franchising requirements and other

regulations imposed on traditional cable systems. Similarly, exempting SMATV operators from treatment as cable systems has been described by the Commission as a means "of creating a more diverse and competitive telecommunications environment." In re Earth Satellite Communications, Inc., 95 F.C.C.2d 1223, 1231 (1983), aff'd sub nom. New York State Comm'n On Cable Television v. FCC, 749 F.2d 804 (1984).

Nevertheless, Congress has determined that today the franchised cable industry continues to hold "undue market power." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(2) ("1992 Act"). MVPDs, including MMDS and SMATV operators, offer "no significant competition" to the franchised cable industry. S. Rep. No. 92, 102d Cong., 1st Sess. 8 (1992) ("S. Rep."). Therefore, as part of an extended effort to nurture and promote the ability of MMDS and SMATV operators to become competitive, Congress enacted the cross-ownership ban contained in Section 11 of the 1992 Act. Permitting the franchised cable industry to invest significantly in MMDS and SMATV companies would result in that industry's usurping benefits that Congress intended to allot to bona fide competitors to franchised cable operators, thus frustrating Congress' desire to stimulate true competition in the video distribution marketplace. As the Senate Report to the 1992 Act states, Section 11 seeks "[t]o further diversity [in the

media of video distribution] and prevent cable from warehousing its potential competition" S. Rep. at 47.

To achieve these objectives, and subject to two exceptions, the statutory cross-ownership restriction makes it unlawful for a cable operator

to hold a license for [MMDS] service, or to offer [SMATV] service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system.

1992 Act, § 11(a)(2), 47 U.S.C.A. § 533(a)(2) (Supp. 1993).

The most obvious and direct means of prohibiting the cable industry from invading and co-opting the MMDS industry is to bar cable operators from directly holding a MMDS license for service in the franchise area. Such a bar is mandated by the plain language of the statute and has been incorporated in the Commission's rules. Report, ¶¶ 101-03.^{3/} In addition, fulfillment of congressional intent requires a prohibition against a cable operator being able to obtain a significant equity interest in a MMDS licensee, and thus achieve indirectly what it could not do directly. The Commission addressed this aspect of the cross-ownership issue by limiting cable investment in a MMDS licensee to a five percent share. Report, ¶ 104.

^{3/} To be specific, the statute and the Commission rules bar the provision of MMDS service by a cable operator within that portion of the franchise area actually served by the operator.

Section 11 of the 1992 Act mandates analogous limitations on cable investment in the SMATV industry, although distinctions in the manner of market entry as between SMATV and MMDS operators must be recognized. For instance, whereas certain frequencies are the exclusive domain of MMDS operators and can be kept out of the direct control of cable operators by simply barring them from MMDS licensing eligibility, SMATV operators are not governmentally licensed and have no comparable, federally sanctioned domain of exclusivity. Although under current law SMATV operators are restricted to providing service to commonly owned or managed multiunit dwellings, 47 U.S.C.A. § 522(7)(B) (Supp. 1993), they have no automatic right of access to such premises at all, a circumstance which is hardly comparable to a MMDS licensee's exclusive right of access to its protected frequencies. Rather, SMATV operators must compete with franchised cable, MMDS and, soon, DBS operators for the access rights that are controlled by the owner of the multiunit dwelling, not by the government.

Thus, all MVPDs already possess the ability to compete to be the service provider to any particular multifamily property.^{4/} Neither Congress nor the Commission

^{4/} In some states, control of access rights to private property is vested in the franchised cable operator in the form of mandatory access laws. In these states, franchised operators need not compete for access since it has been granted to them by the legislature. Such laws simply strengthen what Congress characterized as the "undue market (continued...)

has sought to prohibit a cable operator from having access to a SMATV operator's normal domain, i.e., access to a multiunit dwelling, in the way that a franchised cable operator's access to MMDS frequencies has been completely curtailed. Accordingly, and as discussed further below, it is error for the Commission to interpret Section 11 so as to prevent a SMATV operator from selling or assigning an individual access contract to a franchised cable operator since Congress never intended to prevent cable operators from offering their service to multiunit buildings in the first place.

Although not licensed to use the airwaves or the public streets, SMATV operators do enjoy other freedoms which, like exclusive licensing of MMDS operators, have been bestowed upon SMATV operators as a means of promoting their competition to the traditional cable industry. It is these benefits unique to SMATV that Congress intended to put beyond the reach of cable operators, just as Congress intended to prohibit cable operators from holding an MMDS license. The primary, and perhaps only, such advantage enjoyed by a SMATV operator is its exemption from the local franchising requirement and the resulting exemption from the types of obligations routinely imposed by local franchising authorities. The plain and direct means of prohibiting the cable industry from

^{4/}(...continued)

power" of the franchised cable industry, since MMDS, SMATV and other distributors of multichannel video programming are granted no such mandatory access rights.

usurping this benefit is to require cable operators to comply with all franchise requirements when providing multichannel video service within their franchise area, despite the use of SMATV technology, i.e., a separate satellite dish facility employed to provide service only to a single building or complex of buildings.

In the cable/SMATV context, this restriction is the equivalent of banning a cable operator from holding a MMDS license for service in its franchise area and thus avoiding franchise requirements. And, as with the MMDS restriction and for the same reason, congressional intent regarding cable/SMATV cross-ownership requires a prohibition against a cable operator being able to obtain an attributable equity interest in a SMATV provider. This regulatory scheme will "further diversity and prevent cable from warehousing its potential competition" in both the SMATV and MMDS contexts, without having the downside of establishing an inequality of treatment between such industries or creating unintentional adverse effects upon the competitive viability of SMATV operators. S. Rep. at 47.

The Report adopts this parallel treatment of cable/SMATV and cable/MMDS cross-ownership to an extent. For example, under the new rules a cable operator must comply with all franchise requirements in those portions of the franchise area it serves, even at multiunit dwellings where it provides service by way of a stand-alone SMATV system that would be

exempt from franchising requirements were it operated by a traditional SMATV operator. Report, ¶ 122. In addition, cable/SMATV cross-ownership is subject to the same five percent attribution rule adopted by the Commission in the cable/MMDS context. Report, ¶ 124.

NPCA does not seek clarification or reconsideration of the equal application of cross ownership rules to MMDS and SMATV as described above. What NPCA objects to is the Commission's adoption of an additional restriction applied solely in the SMATV context and which operates contrary to congressional intent and the plain language of the statute. Specifically, the Commission has "conclude[d] that Congress did not intend to allow cable operators to acquire existing SMATV facilities within the cable operator's actual service area," even if the cable operator will observe all franchise requirements in the operation of the stand-alone SMATV facility. Report, ¶ 123. Thus, a cable operator may itself install and operate a stand-alone SMATV system within its service area (assuming compliance with franchise requirements), but it may not purchase an existing system from a third party such as a SMATV operator or landlord that previously had been providing SMATV service. The Report also appears to prohibit a SMATV operator from assigning or selling its contractual access rights to a multiunit dwelling, even if the transaction does not include a conveyance of any physical

system assets to the cable operator. See Report, p. 41, n. 106.

For some reason unexplained in the Report, the Commission has chosen to impose this restriction on bargaining rights only on SMATV operators. A MMDS provider who wishes to sell or assign its contractual access rights to multiunit dwellings and/or related facilities (to the extent compatible) to a cable operator is free to do so.^{5/} A DBS operator will have the same freedom. Alone among all these MVPDs, only the SMATV operator is barred from conveying its system facilities and apparently its contractual access rights to a cable operator.^{6/} There is no justification for imposing such arbitrary restrictions on just one segment of the MVPD industry.^{7/}

^{5/} The Commission's Report is ambiguous as to whether a SMATV operator may sell its internal building wiring and related components as opposed to the entire separate stand-alone SMATV facility to a local franchised operator. Clearly, the Commission's cross-ownership rules do not prevent a MMDS operator from selling such internal wiring. NPCA seeks clarification and/or reconsideration of this point.

^{6/} Obviously, all of these examples assume that permission for the assignment has been obtained from the property owner, if required.

^{7/} To be sure, NPCA fully agrees with the Commission's construction of Section 11(a)(2) as it affects MMDS since the new rules achieve exactly what the statute compels: a prohibition against the offering of MMDS service by a cable operator in the area served by the franchisee. The assignment of a contractual access right from a MMDS licensee to a cable operator does not violate the statute because it does not result in the provision of MMDS service by the cable operator. Moreover, the MMDS licensee remains free to obtain access rights to other multi-family dwellings in its protected (continued...)

B. The Plain Language Of The Statute Reflects Congressional Intent To Restrict Only The Manner In Which Cable Operators Offer SMATV Service, And Not The Manner In Which They Acquire The Rights And Facilities Necessary To Provide Service

The distinction between facilities installed by the cable operator and facilities installed by a third party and then acquired by the cable operator is found only in the Report; there is no recognition of this distinction in the statute or in the legislative history. Similarly, neither the statute nor the legislative history supports the Commission's actions to the extent the Commission intended also to ban the sale or assignment of access contracts apart from the SMATV facility itself. In contrast to the absolute ban against a cable operator obtaining MMDS licenses in its service area and thus offering MMDS service as an MMDS operator, Congress decided to permit a cable operator to offer SMATV service, as long as the SMATV service is not "separate and apart" from the franchised cable service. Thus, the plain language of the statute demonstrates that Congress intended a narrower restriction on cable/SMATV cross-ownership than in the cable/MMDS context. The Commission's unilateral decision to impose a broader restriction on the assignment of contractual

¹⁷(...continued)

service area, even via acquisition from the local cable operator.

access rights only in the cable/SMATV context contradicts this express intent of Congress.^{8/}

Aside from its discriminatory impact on SMATV operators, a distinction based on the identity of the entity that installed the facilities is inconsistent with the statutory provision in yet another way. The distinction actually drawn by the statute rests on whether or not the cable operator "offer[s] [SMATV] service separate and apart from any franchised cable service" within the service area. 47 U.S.C.A. § 533(a)(2). The statute merely restricts the manner in which a cable operator may "offer" SMATV service, not the manner in which the operator acquires the facilities in order to offer such service. If a cable operator offers

^{8/} The Report states in conclusory fashion that permitting cable operators to acquire facilities from SMATV operators "would undermine the goals of the cross-ownership restriction and eliminate an important potential source of competition for established cable operators." Report, ¶ 123. NPCA strongly disagrees with this conclusion, as set forth in the text above, since it is the Commission's current interpretation of Section 11 which would eliminate SMATV operators as competitors. But whether permitting the sale or assignment of individual access contracts frustrates these objectives or not is irrelevant given the total lack of justification for applying the restriction only in the case of the SMATV industry. A MMDS operator may sell its contractual access rights to 100 multiunit dwellings to a cable operator, with the Commission's blessing, even though that will entirely "eliminate an important potential source of competition" according to the Commission itself. Id. But a SMATV operator who wishes to sell access rights to the cable operator with respect to a single building, usually in order to generate the cash necessary to upgrade and make more competitive its facilities at 10 other properties, is prohibited from doing so, even though that would strengthen competition to the franchised industry. The Commission should rescind this inequitable and unwise treatment of the SMATV industry.

SMATV service that is not "separate and apart" from its franchised service, it is in compliance with the statute regardless of whether it acquired the facilities or installed them itself.

NPCA agrees with the Commission's determination that Congress used the "separate and apart" language to refer to service that does not comply with franchise requirements, since the statute "looks at whether the SMATV service is being offered separate and apart from any franchised 'cable service' not 'cable system.'" Report, ¶ 122. Therefore, the "separate and apart" language cannot also be the basis for the wholly unrelated distinction created by the Commission between a cable operator who installs SMATV facilities and a cable operator who acquires such facilities from a third party. Indeed, the statute provides no basis for the latter distinction, Congress did not intend such a distinction, and Congress did not direct the Commission to create distinctions that will be imposed only on SMATV operators.

As set forth above, the same is true with respect to the sale of an access contract, since such a sale does not preclude the franchised cable operator from offering service to the multiunit building in line with its franchise requirements. The sale of an access contract alone simply does not and cannot transform a franchised cable operator into a SMATV operator because franchised cable operators already

can provide their service to multiunit buildings as an integrated part of their franchised cable service.

C. The Anti-Competitive Effect Of A Restriction On The Sale Of Access Rights Contravenes Congressional Intent

The practical effect of the prohibition apparently imposed by the Commission solely on SMATV operators is to discourage investment in the SMATV industry. The value of a SMATV operator's access rights decreases as potential bidders for those rights are eliminated.^{9/} Naturally, a decrease in the value of the SMATV operator's assets will decrease investment, and in particular will result in reducing the amount that lenders will be willing to finance.

Moreover, the fact that the SMATV operator is exiting from one multiunit property, even when viewed in a vacuum, does not automatically produce a decrease in competition. As noted above, a SMATV operator selling its rights to one property may simply be generating the cash necessary to make worthwhile investments at its other properties, thus increasing the competitive pressure on the franchised industry. In that case, forcing the SMATV operator to hold on to an individual access contract it seeks to assign to the cable operator makes the SMATV operator a weaker competitor and threatens its viability overall.

^{9/} It is far less likely that there will be another SMATV operator or a MMDS operator in the market, or that one will be interested in entering the market solely for the purpose of acquiring a single SMATV facility or access contract.

MMDS and DBS operators are free to assign their access rights to the local cable operator for the purpose of strengthening their overall competitive position or even for the purpose of exiting the MVPD business altogether. SMATV operators are entitled to the same treatment. Congress' intent was not to lock SMATV and MMDS operators into their current positions and access contracts, but to prohibit cable operators from usurping benefits that are intended to be enjoyed by entities offering competition to the franchised industry. Fulfillment of this objective is guaranteed by: prohibiting cable operators from holding MMDS licenses for service that overlaps with their franchise service area; prohibiting cable operators from evading franchise requirements anywhere within their service area regardless of the medium by which service is provided; and enforcing appropriate ownership attribution criteria. The Commission acted in accordance with congressional intent when it implemented these very restrictions. It erred by formulating an additional restriction that has no statutory basis and that is to be imposed on only one segment of the MVPD industry.

D. The Commission Should Clarify Or Reconsider Its Report To Permit A SMATV Operator To Sell Access Rights To Cable Operators

NPCA has styled this petition primarily as one for clarification because the Report is somewhat ambiguous. With respect to the SMATV industry, the Report generally addresses attempts by cable operators to purchase SMATV systems or

facilities (i.e., physical assets), or to obtain an equity interest in a SMATV operator. However, the Report states in a footnote that "where a SMATV contract has been terminated by either party, we would not prohibit a cable operator from providing cable service over preexisting facilities." Report, p. 41, n. 106. Within the CATV and SMATV industries, this language has been interpreted as prohibiting a SMATV operator from assigning its contractual rights in favor of the local cable operator since the assignment of a contract does not cause its termination. If this is the Commission's intent, then NPCA seeks reconsideration of the cross-ownership rule.

On the other hand, if the intent of the footnote was to permit the sale or assignment of contract rights, NPCA requests a clarification of this point. Again, the Commission also needs to resolve the right of a SMATV operator to sell to the cable operator distribution facilities installed within the multiunit dwelling and over which the SMATV operator has retained ownership. Since a MMDS operator who assigns its access rights to the cable operator may sell its interior distribution cable as part of the transaction, there is nothing to suggest that Congress intended different treatment of SMATV operators. Moreover, if the MVPD is entitled to sell its access rights to the cable operator, there is no reason to force the cable operator to invest in a duplicative cable distribution system.^{10/}

^{10/} Obviously, a conveyance of wiring is subject to the home-wiring rules. See Report And Order, MM Docket No. 92-260 (Cable Home Wiring) (Feb. 2, 1993).

CONCLUSION

In enacting Section 11(a)(2) of the 1992 Act, Congress intended to prohibit cable operators from arrogating to themselves certain advantages which it intended solely for the benefit of SMATV and MMDS operators who would use those advantages to provide bona fide competition to the franchised industry. This goal is fulfilled by cross-ownership restrictions of the type proposed above. Congress did not intend restrictions to be based on the construction-versus-acquisition rationale fashioned by the Commission, and clearly would oppose any rationale that singles out the SMATV industry for especially harsh treatment. Accordingly, NPCA requests that the Commission clarify and/or reconsider its Report in accordance with the above.

Respectfully submitted,


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